

May 14, 2004

Mr. John A. Rogovin
General Counsel
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation, WT Docket No. 03-128
Nationwide Programmatic Agreement Regarding the
Section 106 National Historic Preservation Act Review Process

Dear Mr. Rogovin:

CTIA–The Wireless Association™ submits this letter to urge the Commission to resolve a fundamental legal issue in the above-captioned proceeding: Does the Commission have legal authority under the National Historic Preservation Act (NHPA) to adopt rules governing the siting of wireless telecommunications facilities?

The Commission's *Notice of Proposed Rulemaking* in this proceeding¹ proposes to adopt a rule that would obligate wireless carriers and owners of towers to comply with specified procedures for constructing or modifying towers, or face sanctions. The NPRM states that it is based on NHPA Section 106. There is, however, a serious question before the Commission as to whether NHPA authorizes the Commission to adopt rules to regulate the siting of wireless facilities at all.²

The reason this statutory authority question is so central to this proceeding is that the Commission is acting pursuant to Section 106, which grants federal agencies the authority to take into account the effect which federal or federally assisted "undertakings" may have on historic properties. NHPA, however, defines that term to include only a limited number of federal actions, which do not (in the view of the many commenters

¹ *In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, FCC 03-125, *Notice of Proposed Rulemaking*, June 23, 2003, Errata, July 1, 2003 ("NPRM").

² While the Commission summarily concluded in 1995 that registering a structure constituted a "federal action" or "federal undertaking" to justify imposing environmental rules on registrants, there is no evidence in the record supporting such a conclusion. *See In the Matter of Streamlining the Commission's Antenna Structure Clearance Procedure*, 11 FCC Rcd 4272, 4289 ¶ 41 (1995). Moreover, the Commission has never explained its authority to impose NHPA obligations on non-registered structures or the private activities connected with the construction of CMRS wireless facilities. *See also* Sprint Comments, 6-20 (filed Aug. 8, 2003).

who addressed this issue in the record of this proceeding) include constructions or modifications to wireless facilities.

This is a “gating” legal issue, because the entire premise for mandatory rules is that they are authorized by NHPA. Put another way, absent a finding that facilities siting constitutes a federal or federally assisted undertaking, the Commission has no authority to adopt rules implementing the NHPA. While media reports indicate that the Commission’s adoption of a Nationwide Programmatic Agreement is imminent, CTIA is concerned that the ensuing Order may merely assume such legal authority exists rather than confront the scope of Section 106. We strongly believe the Commission is obligated in this proceeding to determine whether or not the construction or modification of wireless facilities constitutes an undertaking. The Commission needs to address this fundamental legal issue for the following reasons:

First, the Commission’s legal authority to act is always an issue that the Commission must consider and address in its actions, because possessing proper legal authority is crucial to the agency’s lawful discharge of its duties. Put another way, the issue of legal authority is never “beyond the scope” of a rulemaking. Whether or not a rulemaking notice specifically sought comments on the agency’s underlying authority, establishing that authority is a prerequisite to agency action.

Second, the Commission’s failure to address the application of Section 106 to siting of wireless facilities in this proceeding would also be inconsistent with rulings by federal courts. Federal agencies such as this Commission – not the Advisory Council on Historic Preservation – are responsible for determining which actions they take constitute undertakings. *See, e.g., National Mining Ass’n v. Slater*, 167 F. Supp. 2d 265 (D.D.C. 2001) (“[a]gencies themselves – and not the Council’s regulations – that determine whether a particular project is an ‘undertaking’ under section 106.”).

Third, many parties have raised this issue squarely and comprehensively in the record of this rulemaking, and for this reason alone the Commission is obligated to address it. For example:

- Sprint Corporation devoted its entire opening comments to the “undertakings” issue. Sprint included a detailed case analysis documenting federal court decisions that support the argument that wireless facilities siting is not a federal undertaking. Sprint addressed the undertakings legal issues again on reply.
- Other carriers argued in their initial and/or reply comments that the Commission lacked clear authority to adopt rules in this proceeding and urged that the Commission address this issue in its Order. *See* Comments of Verizon Wireless (at pages 3-6), Reply Comments of AT&T Wireless, T-Mobile USA and Western Wireless (at pages 9-10); Comments of Crown Castle USA (at 5-8). Many of these commenters cited case precedent supporting their argument that facilities siting is not an “undertaking” within the meaning of NHPA Section 106.



- All of the trade associations that addressed this issue agreed with Sprint and the other individual parties. See CTIA Comments (at 40-41), CTIA Reply Comments (at 3-5), PCIA Comments (at 30-32), PCIA Reply Comments (at page 12), National Association of Broadcasters Comments (at 2-5).
- No party filed any contrary legal analysis explaining why the construction or modification of wireless facilities in fact constituted a federal undertaking.

CTIA is particularly concerned that the pending Order will again elude the fundamental issue of whether siting of wireless facilities is by law an undertaking under NHPA, because this same issue has been awaiting a Commission decision for over three years. In 2001, the Commission adopted an earlier Programmatic Agreement regarding collocation of wireless facilities, but failed to determine that procedures for tower siting constituted an “undertaking” (despite comments in the record requesting that it do so). On May 1, 2001, Sprint Corporation filed a Petition for Reconsideration of that decision, raising there (as it had earlier in that proceeding) the Commission’s legal authority under Section 106. Despite repeated requests over the past three years to address Sprint’s petition, the Commission has ignored it.³

Whether tower constructions or modifications for wireless services constitute an undertaking is the “elephant in the room” in this proceeding. It cannot be ignored, because determining that the construction or modification of wireless facilities is by law an undertaking is the critical prerequisite to adopting any mandatory rules. Deferring this issue to another day on the theory that it is beyond the *NPRM*’s “scope” would constitute arbitrary and unlawful “cart before the horse” rulemaking.

Given the amount of attention devoted to the undertakings issue by so many parties in the comment and reply round, there is no doubt that the Commission’s authority to act is properly raised in this proceeding. For this reason and because the issue is fundamental to the Commission’s authority to adopt its proposed rules, the Commission must face the statutory issue and decide it.

³ The Commission has similarly failed to act on this issue in a proceeding brought by Verizon Wireless, which raised the Commission’s legal authority to regulate wireless tower siting in response to an action by the Wireless Telecommunications Bureau. In the Matter of Proposed Verizon Wireless Antenna in Bay Head, Ocean County, New Jersey, Petition for Reconsideration and Request for Referral to the Commission or, in the Alternative, Petition for Declaratory Ruling, Expedited Action Requested, filed September 15, 2003. Neither the Bureau nor the Commission has acted on that request.



Pursuant to Section 1.1206 of the Commission's Rules, two copies of this letter and attachment are being filed in the docket of this proceeding.

Very truly yours,

Michael Altschul
Senior Vice President and
General Counsel

cc: John Muleta
K. Dane Snowden
John Rogovin
Bryan Tramont
Sheryl Wilkerson
Sam Feder
Jennifer Manner
Paul Margie
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